IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 11703 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAILNAGAR CO.OP.HOSG.SO.LTD, - Petitioner(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR DC DAVE for Petitioner(s) : 1,
MR PATHIK ACHARYA, ASST. GOVERNMENT PLEADER for Respondent(s) : 1,
None for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 08/05/2007

ORAL JUDGMENT

1. By way of this petition under Article 226 of the Constitution of India, the petitioner society through its President has prayed for an

appropriate writ, direction and/or order directing the respondents not to insist for payment of any premium as a condition precedent pursuant to Clause – 6 of the order dated 14.5.1990 when the concerned member of the petitioner society intends to transfer his right as a member of the petitioner in favour of a third party to be enrolled as a member of the petitioner society along with a right to occupy the concerned sub-plot which was allotted to the outgoing member of the petitioner society as a member of the petitioner from the parcel of the land allotted to the petitioner society pursuant to the orders dated 14.5.1990 and 25.11.1991 and consequently, it is prayed to quash and set aside Clause – 6 of the order dated 14.5.1990.

2. The land bearing Survey No. 496 situated at Rajkot was a Kharaba land and the petitioner society applied for the said land for residential purposes and the said application was processed by the State Government and on the basis of the order passed by the State

Government dated 22.11.1988, the Collector, Rajkot by order dated 14.5.1990 allotted 13,300 sq mts of land out of the land bearing Survey No.496 paiki for 133 members as impartible land on the conditions attached with the said order, more particularly, Clause – 6 that as and when the land is sold and/or transferred, the transferor has to pay the premium. It is also required to be noted that the petitioner society accepted the said allotment without any objection, more particularly, without objecting to Clause – 6 with regard to payment of premium at the time of transfer. It also appears that thereafter the petitioner society applied for additional 2259.36 sq mts of land and the said application was also considered and accepted and by order dated 25.11.1991, additional 2259.36 sq mts of land from the land bearing Survey No. 496 paiki came to be allotted to the petitioner society on the same terms and conditions as per the earlier order dated 14.5.1990 i.e. the land cannot be sold without prior permission of the respondent No.2 and that too only on payment of

premium as determined by the respondent No.2. It is also required to be noted that the petitioner society and its members accepted the aforesaid conditions also and accepted the allotment without any objection. That being aggrieved and dissatisfied with the aforesaid conditions, more particularly, Clause – 6 of the conditions attached with the order dated 14.5.1990 as well as subsequent order dated 25.11.1991 i.e. the condition that the plot shall not be transferred without prior permission of the respondent No.2 i.e. Collector, Rajkot and that too can be transferred only on payment of premium to be determined by the Collector, Rajkot, the petitioner society has preferred the present Special Civil Application under Article 226 of the Constitution of India in the year 2007.

3. Shri D.C. Dave, learned advocate appearing for the petitioner society has vehemently submitted that when the land was allotted to the petitioner society and its members on payment of market price and when the market price was paid,

it was not open for the Collector, Rajkot to impose the condition that the land is unalienable and that the same shall not be transferred without prior permission of the respondent No.2 – Collector, Rajkot and that too on payment of premium to be determined by the Collector, Rajkot. He has further submitted that such a condition was contrary to the policy of the Government and the Government Resolution of the year 1963. It is submitted that once the land is allotted to the society for its members and after sub-plotting it is allotted to the respective members who have put up their construction, all the members have become independent owners of the plots and that only membership rights are transferred along with the super structure and what is transferred is occupancy rights and therefore, either the permission is not required and/or the action of the respondents in insisting for the prior permission of the Collector, Rajkot and to pay the premium at the time of transfer is absolutely illegal and arbitrary. It is further

submitted that question of extending the application of Clause – 6 to the members of the petitioner when they intend to transfer their rights as members of the petitioner, pales into absolute insignificance. It is further submitted that as such, the petitioner society is a co-operative housing society and the said land was allotted to the society and the said parcel of land and any portion thereof does not stand allotted to any member of the petitioner society pursuant to the aforesaid orders and the concerned persons / members of the petitioner society acquires a right on their being the members of the petitioner society to occupy the portion of the said parcel of land carved out as sub-plots for the purpose of catering to the housing needs and therefore, the concerned person, who is a member of the petitioner simply acquires a right to occupy sub-plot carved out from the said parcel of land by the petitioner on account of he being a member of the petitioner society. Thus, there is no transfer of ownership in respect of such portion of land.

Therefore, it is submitted that there is no transfer of ownership of the said parcel of land or any part thereof when a member of the petitioner society intends to enter into a transaction with a third party, who is to be enrolled as a member of the petitioner society in place of the outgoing member along with the right which was owned and possessed by the outgoing member to occupy the sub-plot allotted to him by the petitioner society and therefore, it is submitted that while transferring the membership and a right to occupy, there is no transfer of ownership by the member and therefore, as such, Clause – 6 would not be attracted and therefore, there is no question of taking prior permission of the Collector and payment of premium at the time of transfer. He has also further submitted that even condition No.6 of the order dated 14.5.1990 are absolutely illegal and arbitrary and such a condition would not be imposed by the Collector, Rajkot and therefore, it is requested to grant the reliefs as prayed for.

4. Shri Pratik Acharya, learned AGP while opposing the present Special Civil Application has submitted that once the condition imposed vide order dated 14.5.1990 while allotting the land in favour of the petitioner and has been accepted in the year 1990-91 and the petitioner society has never objected to the same, it is now not open for the petitioner to challenge the said condition after the period of 16 to 17 years. It is also further submitted that as such, the petitioner society has accepted all the conditions at the time of allotment of the land and therefore, the Collector, Rajkot allotted the aforesaid land otherwise, Collector, Rajkot and/or the State Government might not have allotted the said land if the society had objected to the said conditions at that time. It is also further submitted that as such, it was not obligatory on the part of the State Government and/or the Collector, Rajkot to allot the aforesaid land being a waste land and there was no right in favour of the petitioner

society to insist for allotment. However, the State Government and the Collector, Rajkot considered the request of the petitioner society and directed to allot the land to the society for its members on certain conditions and when the said conditions came to be accepted and/or were never objected by the petitioner society, it is now not open for the petitioner society to challenge the same. So far as contention on behalf of the petitioner that Clause – 6 would not be applicable when the member of the society intends to transfer the membership right and right to occupancy is concerned, he has submitted that if the said contention is accepted, in that case, condition No. 6 imposed while allotting the land in favour of the society would become nugatory and what is not permissible by the society, cannot be permitted to be done by its members. Therefore, it is requested to dismiss the present Special Civil Application.

5. Heard the learned advocates appearing on behalf

of the respective parties.

6. It is required to be noted that the land bearing Survey No. 496 paiki situated at Rajkot was a Government waste land and the petitioner society applied for the said land for its members for residential purposes. The application of the petitioner society came to be considered by the State Government as well as by the Collector, Rajkot and by order dated 14.5.1990, 13,300 sq mts of land came to be allotted for its 133 members on certain conditions and one of the condition, more particularly, Clause – 6 was that the land cannot be transferred without prior permission of the Collector, Rajkot and that too can be transferred only on payment of premium to be determined by the Collector, Rajkot. It is required to be noted that the petitioner society accepted the said condition and accepted the allotment and did not raise any objection at the relevant time. It is also required to be noted that subsequently an application was given for additional land of

2259.36 sq mts of land and the said application was considered and accepted by the Collector, Rajkot and the additional land came to be allotted by order dated 25.11.1991 on the same terms and conditions stipulated in the order dated 14.5.1990 with regard to impartible land and the condition that the land cannot be transferred without prior permission of the Collector, Rajkot and that too the land can be transferred only on payment of premium to be determined by the Collector, Rajkot. It is also required to be noted that even at that time also the petitioner society did not raise any objection with regard to the said condition and even accepted the additional land also. Under the circumstances, once the aforesaid conditions are accepted by the petitioner society, it is now not open for the petitioner society to challenge the said conditions after the period of 16 to 17 years and that too after having accepted the said conditions. The learned counsel appearing for the petitioner has as such, fairly conceded that there was no right in

favour of the petitioner society to insist for the allotment of the Government waste land and it was not incumbent on the part of the State Government and/or the Collector, Rajkot to allot the said land in favour of the petitioner society. Under the circumstances, when the land came to be allotted in favour of the petitioner society in the year 1990-91 on certain conditions, it is now not open for the petitioner society to challenge the same after the period of 16 to 17 years. Had the said conditions objected by the petitioner society at the relevant time, in that case, the State Government and/or the Collector, Rajkot might not have allotted the said land to the petitioner society. Under the circumstances, it is now not open for the petitioner society to challenge the said conditions.

7. So far as the contention on behalf of the petitioner society that after the land was allotted to the petitioner society and sub-plottings were done and the members were

allotted the land and the ownership of the entire land vested with the petitioner society and by allotment of the land, the members were given only occupancy rights and therefore, the ownership is not transferred and only occupancy rights are transferred and therefore, Clause – 6 and the said conditions with regard to taking prior permission of the Collector, Rajkot at the time of transfer and the payment of premium would not be applicable is concerned, the said submission seems to be very attractive but without any substance. First of all, what could not have been done directly by the society, would not be permitted to be done by its members indirectly. If the contention on behalf of the petitioner society is accepted, in that case, condition No.6 / Clause – 6 of the orders dated 14.5.1990 and 25.11.1991 would become nugatory and will never be given effect. If the society cannot transfer the land to any other person without prior permission of the Collector, Rajkot and that too can be done only on payment of premium to be determined by the Collector,

Rajkot, in that case, certainly the members also cannot transfer the land without prior permission of the Collector, Rajkot and on payment of premium to be determined by the Collector, Rajkot under the guise of transfer of membership and the occupancy rights. Under the circumstances, the contention on behalf of the petitioner society that when member transfers his membership right and the occupancy right, he is not required to obtain prior permission of the Collector, Rajkot and he is not required to pay the premium as per Clause – 6 / Condition No. 6 of the order dated 14.5.1990 cannot be accepted and the said contention has no substance at all.

8. For the reasons stated above, there is no substance in the present Special Civil Application and the same is required to be dismissed and is accordingly, dismissed.

[M.R.Shah, J.]

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